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Supreme Court of the United States

October Term, 1975

No. 75-1399

FRANCIS J. WARIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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TABLE OF CONTENTS

Table of Authorities II
Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional Provisions and Statutes and Regulations Involved 2
Statement of the Case 3
Reasons for Granting the Writ 8

I. The Decision of the Court of Appeals Conflicts in Several Respects With Prior Decisions of This Court 8

A. The Decision Below Is in Conflict With This Court's Decision in *United States v. Miller* 8

B. The Decision Below Is in Conflict With the Conclusion Which Is Reached by Considering This Court's Decisions in *Shuttlesworth v. Birmingham* and *United States v. Freed* 13

II. The Decision of the Court of Appeals Conflicts With Other Circuit Courts As to a Proper Interpretation of the Decision in *United States v. Miller* 15

III. The Subject Matter of This Case Raises Significant and Recurring Problems Concerning the Right of the Individual to Keep and Bear Arms 16

Conclusion 21

POOR COPY

APPENDIX:

Judgment of the Court of Appeals A1
Opinion of the Court of Appeals A2
Opinion and Order of the District Court A12

United States Constitution:

Second amendment A19
Fifth amendment A19
Ninth amendment A19

26 U.S.C. Section 5861(d) and (f) A19
26 C.F.R. Section 179.62 ..... A20
26 C.F.R. Section 179.63 ..... A21
26 C.F.R. Section 179.64 ..... A21
26 C.F.R. Section 179.65 ..... A22

TABLE OF AUTHORITIES

Cases

Aymette v. State, 2 Humphreys (Tenn.) 154 (1841) 9
Cases v. United States, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom., Velazquez v. United States*, 319 U.S. 770 (1943) 12
Cody v. United States, 460 F.2d 34 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1973) 15
Eckert v. Philadelphia, 477 F.2d 618 (3rd Cir.), *cert. denied*, 414 U.S. 839 (1973) 16
Freedman v. Maryland, 380 U.S. 51 (1965) 13, 14, 15
Presser v. Illinois, 116 U.S. 252 (1886) 10, 17
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 13, 15
State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968) 18

BLEED THROUGH

United States v. Cruikshank, 92 U.S. 542 (1876) 17
United States v. Day, 476 F.2d 562 (6th Cir. 1973) 16
United States v. Decker, 446 F.2d 165 (5th Cir. 1971) .. 16
United States v. Freed, 401 U.S. 601 (1971) 13, 15
United States v. Miller, 307 U.S. 174 (1939) 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20
United States v. Tot, 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943) 12

Constitutions

Ohio Constitution, art. IX, sec. 1 10
United States Constitution, amend. II 2, 3, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20
United States Constitution, amend. V 2, 3, 7, 8, 13
United States Constitution, amend. IX 2, 3, 7, 9, 17, 20

Statutes and Regulations

26 C.F.R. Part 179 6
26 C.F.R. Part 179.62 .....2, 14
26 U.S.C. Section 5861 .....2, 3, 6, 13
26 U.S.C. Section 5871 3
28 U.S.C. Section 1254 (1) 2
32 U.S.C. Section 701 10

Other

THE FEDERALIST PAPERS, Mentor Book ed. (1961) 19, 20
Fuller and Gotting, *The Second Amendment: A Second Look*, 61 NORTHWESTERN L. REV. 46 (1966) 18
Note, 31 ALBANY L. REV. 74 (1967) 9
OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 18-19

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BLEED THROUGH

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OPINIONS BELOW

The Memorandum Opinion containing the findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio, Western Division, is unreported, and reproduced at page A12 of the Appendix to this Petition. The Opinion of the United States Court of Appeals for the Sixth Circuit, not yet officially reported, is reproduced at page A2 of the Appendix. (Reference to the Appendix shall hereafter be referred to as App. at p. .....)

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JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1976. On February 23, 1976, Justice Potter Stewart signed an order extending the time to file a Petition for Writ of Certiorari to April 5, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the petitioner's activity of manufacturing and possessing the firearm in question was protected under the second amendment to the United States Constitution in view of the petitioner's membership in the militia of the State of Ohio.

2. Whether the registration requirements of 26 U.S.C. Section 5861, Title II of the National Firearms Act, pertaining to the manufacturing of certain types of firearms are violative of the established fifth amendment due process safeguards.

3. Whether the petitioner's activity of possessing the firearm in question, regardless of its military relationship, was protected by the ninth amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

This case involves the second, fifth and ninth amendments to the United States Constitution Title 26, U.S.C. Sections 5861 (d) and (f); and Title 26, C.F.R. Parts 179.62-.65. The relevant provisions are set forth at page A19 of the Appendix.

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STATEMENT OF THE CASE

An indictment was returned in the United States District Court for the Northern District of Ohio at Toledo, Ohio against the petitioner charging that on or about the 19th day of March, 1974, he did willfully and knowingly possess a certain 9 mm prototype submachine gun which had not been registered to him in the National Firearm Registration and Transfer Record, as required by Title 26, U.S.C. Section 5861 (d) and 5871. To the charge, the petitioner entered a plea of not guilty and the matter was thereafter set for trial.

Prior to the time of trial, the petitioner filed a motion to dismiss the indictment on the grounds that the statutes upon which the indictment was laid were unconstitutional as applied to his activities. Specifically, he argued that the statute was unconstitutional on second, fifth and ninth amendment grounds. The district court overruled the motion.

A non-jury trial was had on October 18, 1974 before District Judge Don J. Young. At the outset of the trial, the parties entered into the following stipulations:

(1) On or about the 19th day of March, 1974, in the Northern District of Ohio, Western Division, the petitioner did willfully and knowingly possess a 9 mm prototype submachine gun measuring approximately 21 inches overall length, with a barrel length of approximately 7½ inches, which had not been registered to him as required by law. Trial Transcript at pages 3-4 (hereafter referred to as T. at p. .....).

2. That submachine guns in general and 9 mm submachine guns in particular are utilized by the armed forces of the United States; that such weapons are part

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of the ordinary military equipment of the United States military; and that such weapons do bear a reasonable relationship to the presentation or efficiency of the military forces and/or the militia (T. at pp. 4-5).

Thereafter, the government called one witness, an agent of the Bureau of Alcohol, Tobacco and Firearms, who testified that on March 19, 1974, the petitioner came to the Bureau's office in Toledo and produced a brown bag containing a certain 9 mm prototype submachine gun with a clip. These items were identified and admitted into evidence without objection.

On cross-examination, the agent testified that he had met the petitioner on one prior occasion and that was in response to a certain letter which was received by the Bureau wherein the petitioner advised that he was going to manufacture a certain prototype machine gun for the purposes of, *inter alia*, presentation to the military and for his own use in relation to his membership in the militia of the State of Ohio. The letter also stated that the petitioner did not intend to register the weapon or to pay a tax thereon because he believed that Title II of the Gun Control Act of 1968, 26 U.S.C. Sec. 5801 *et seq.* was unconstitutional as applied to such activity (T. at pp. 10-11). The agent further testified that following the March 19th visit, the weapon was examined to determine whether it was operable. Once it was ascertained that it was in fact made operable by adding a firing pin, the agent requested and subsequently obtained an indictment.

The petitioner testified in his own behalf. He stated that he was 43 years of age, was a naturalized American citizen and a resident of the State of Ohio. He further testified that he had never been convicted of any crime and was not then or had he ever been under any mental disability (T. at p. 16). He testified that he was the chief

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design engineer for Ares, Inc. located in Port Clinton, Ohio. The business of Ares, Inc. is the research and development of firearms. In that capacity, he has secret clearance from the government (T. at pp. 16-17). The petitioner testified that his hobbies consisted of collecting and designing guns and pursuant to such, he had designed and manufactured the 9 mm submachine gun which had been admitted into evidence by the government (T. at p. 18). His stated purpose for manufacturing the firearms was threefold:

(1) To develop a certain mechanical principle involving the trigger mechanism and feeding and ejecting device. Once perfected, other prototypes of the same design were to be designed and manufactured for presentation to the appropriate military authorities and eventually to secure a government contract for himself (T. at p. 19), and

(2) For his own personal use—for testing and training purposes (T. at p. 20), and

(3) To use to challenge the constitutionality of the Gun Control Act (T. at p. 19). In this regard, the petitioner testified as follows:

> Q. Now, you heard Mr. Shaw testify that on a certain date, March 19, I believe, you appeared at his office in this building with a bag, with government exhibit 1 in that bag?
>
> A. Yes.
>
> Q. What were the circumstances leading up to that?
>
> A. Since almost Day One, since my arrival in the States, I tried to—how I can I put this design—how can I design a weapon for my own entertainment. I

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don't know if the word is correct. I have been subject to a very—I mean quite a bit of frustration. I tried many times to build guns, going through regular channels, but for one reason or the other it was impossible. Every time I tried to do something in the military field—I mean the machine gun, for instance—I run into the gun control act, and I believe that the Constitution gives me the right to keep arms of my choice, for training, for militia duty, of course, but just the same act. I have a personal right to keep arms.

Q. That is your belief?

A. That is my belief. (T. at p. 21.)

The petitioner presented no other evidence except for the stipulations previously agreed upon relative to the fact that a weapon of this type does bear a reasonable relationship to the preservations or effeciency of the military and/or the militia.

It is important to recognize that under the peculiar facts of this case, the petitioner was charged with being in possession of the weapon which he had personally manufactured. No transfer of the particular weapon ever occured. Therefore, had the petitioner been a duly licensed manufacturer, he could not have been charged with being in possession of a weapon that he had manufactured. In view of this particular relationship between the manufacture and the possession of the same weapon, the petitioner urged the District Court to consider the statute and the various regulations pertaining to the manufacture of this type of weapon. See Title 26, Section 5861(f); 26 C.F.R. Part 179.

The District Court filed its opinion on January 24, 1975. The Court found that the petitioner being an adult male, and a citizen of the State of Ohio, was by law, a member

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of the State militia, *albeit*, the "sedentary militia" rather than the active militia. The Court further found that the petitioner had designed and manufactured the weapon in question which is a firearm as described in the Act and that the weapon is a type which is standard for military use, utilizing standard military ammunition. On the basis of its findings of the petitioner's character as a militiaman, and of the weapon being a proper military weapon, usable in its exact form for military purposes, the Court, citing *United States v. Miller*, 307 U.S. 174 (1939), held that the petitioner "may properly argue that his situation falls squarely within the scope of the Second Amendment". App. at p. A14. Notwithstanding this constitutional protection, the District Court upheld the constitutionality of the Act on the grounds of the Congressional taxing power. The Court, referring to the second amendment stated:

> that right, like other rights in the Bill of Rights, is subject to reasonable limitations and is not absolute .... The imposition of a tax and attendant regulations to insure the enforcement of a tax on the import or manufacture and the transfer of certain firearms which is within the power of Congress cannot be challenged in the courts, but only in the Congress. App. at pp. A17-A18.

The District Court did not entertain the fifth and ninth amendment claims raised by the petitioner.

The District Court found the petitioner guilty of the first and only count of the indictment and sentenced him to a term of probation for a period of three (3) years.

The Sixth Circuit Court of Appeals did not dispute any of the factual findings of the District Court. But the Court of Appeals did disagree with the finding that the petitioner's activities were protected by the second amendment. The Court of Appeals limited the decision of *United*

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States v. Miller, supra, to its facts and concluded that the second amendment conferred only a collective and not an individual right. But even if the petitioner's activities were within the protection of the second amendment, the Court went on to say, that amendment is not absolute and Section 5861(d) represents a reasonable revenue raising measure—a tax on specified transactions involving firearms and not a tax on the right to keep and bear arms.

The Court of Appeals summarily dismissed the fifth amendment challenge on the basis that the petitioner was charged and convicted of possession and not the manufacture of the weapon. The Court also dismissed the ninth amendment claim on the grounds that no fundamental rights were violated.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS IN SEVERAL RESPECTS WITH PRIOR DECISIONS OF THIS COURT.

A. The Decision Below Is in Conflict With This Court's Decision in United States v. Miller.

In *United States v. Miller*, 307 U.S. 174 (1939), this Court was for the first and only time faced with the constitutionality of a federal firearms regulation (The National Firearms Act of 1934, a forerunner of the Gun Control Act of 1968), with respect to a second amendment claim. This Court declared the obvious purpose of the second amendment was to support and effectuate the militia and must "be interpreted and applied with that end in view." 307 U.S. at 178. It further held that if a particular weapon does not bear some reasonable relationship to

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the preservation or efficiency of a well regulated militia, the amendment would not affect the power of Congress to prohibit the keeping and bearing of such a weapon. The implication of the *Miller* decision is, therefore, that if such a relationship does exist, then the government cannot impose undue restrictions upon the possession and/or use of that weapon. See Note, 31 ALBANY L. REV. 74, 78 (1967).

The weapon involved in *Miller* was a sawed-off shotgun. With reference to this type of weapon, this Court stated:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated Militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. 307 U.S. at 178.

In *Miller*, this Court cited with approval and relied heavily upon the decision of *Aymette v. State*, 2 Humphreys (Tenn.) 154 (1841), wherein it was stated at p. 158:

> The legislature . . . (has) a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, *and* which are not usual in civilized warfare, *or* would not contribute to the common defense. (Emphasis added.)

The true holding of the *Miller* decision is, therefore, that there must be a fact finding hearing before the second amendment defense can be disregarded. There must be an opportunity to present evidence on the question of the nexus between the particular weapon and the common

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defense. The logical extension of *Miller* is that where such a showing has been made, then a second amendment defense becomes viable. And any regulation which unduly restricts the right to keep and bear such a weapon would, therefore, run afoul of that amendment.

Here the District Court heard stipulated evidence that the firearm in question is part of the ordinary military equipment, and further, that this type of weapon bears a reasonable relationship to the efficiency or preservation of the militia. Based upon these findings, the government cannot unduly restrict the petitioner's right to keep and possess the weapon in question for such activity is constitutionally protected.

Indeed, there exists a nexus between the petitioner and the militia of the State of Ohio. Under the Ohio Constitution, art. IX, sec. 1, all citizens between the ages of seventeen (17) and sixty-seven (67) are members of the state militia. A small portion of this group are members of the active militia or National Guard. The remainder, including the petitioner, are members of what may be styled the "sedentary militia" of the State. (See *Presser v. Illinois,* 116 U.S. 252 (1886) where the Court stated at p. 265: "all citizens capable of bearing arms constitute the reserve military force or reserve militia of the United States as well as of the states . . . .".)

Members of the Ohio National Guard are furnished their weapons by the regular army "so far as practical". 32 U.S.C. Sec. 701. No similar provision is made for the members of the reserve militia. Therefore, in the event of an emergency necessitating the activation of the reserve militia, these individuals would be expected to furnish their own arms. This is why the second amendment speaks of the right to *keep* arms. (See *United States v. Miller*, *supra*, at p. 179 where the Court stated: "When called for ser-

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vice these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time".) Furthermore, for the sake of standardization of arms and ammunition, the weapon furnished must be the type used by the organized military forces. As stipulated, the firearm involved here fits this classification and would, therefore, be entitled to second amendment protection. Therefore, the District Court correctly held that the petitioner, as a member of the sedentary militia could avail himself of a second amendment defense.

The Court of Appeals did not follow the reasoning of this Court's *Miller* decision. The Court of Appeals stated that:

> In holding that the absence of evidence placing the weapon involved in the charges against Miller in one of these categories precluded the trial court from questioning the indictment on Second Amendment grounds, the Court did not hold the converse—that the Second Amendment is an absolute prohibition against all regulation of the manufacture, transfer, and possession of any instrument capable of being used in military action. App. at pp. A5-A6.

It is true that in *Miller*, the Court did not hold the converse. But the logical extension of *Miller* is that where the requisite relationship does exist between the weapon and the military, then the keeper and/or bearer of that weapon comes within the protection of the second amendment and any unreasonable restriction on the right runs afoul of that protection. Indeed, if no individual right to keep and bear arms existed, it would have been meaningless for the Court to have made the distinction, as it did in *Miller*, between situations involving an individual's right to keep and/or bear arms where there exists a reasonable relationship between such activity and the preservation

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and efficiency of the military and those situations where no such relationship exists. This Court would have simply held that no individual may claim any second amendment protection if that was what was intended in *Miller*. In deciding *Miller* as it did, this Court could only have intended that in a proper factual situation an individual may indeed make a second amendment defense to a criminal charge.

In reaching the result it did, the Court of Appeals relied upon the decisions of *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom., Velazquez v. United States*, 319 U.S. 770 (1943). However, close scrutiny of that decision indicates that it is complementary to the *Miller* decision. In *Cases*, the Court specifically stated at pp. 922-23:

> While the weapon may be capable of military use . . . there is no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career. In fact, the only inference possible is that the appellant . . . was in possession of . . . the firearms . . . on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state. (The decision of *United States v. Tot*, 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943) which was also relied upon by the Court of Appeals contains similar language.)

In contrast to that factual setting, here the District Court heard stipulated evidence that the weapon involved is part of the ordinary military equipment of the military

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and that this type of weapon does indeed bear a reasonable relationship to the efficiency or preservation of the militia. Here the District Court had undisputed evidence that the petitioner was by law a member of the militia of the State of Ohio. And here the Court heard testimony that one of the petitioner's purposes in designing and constructing the weapon was for future presentment of the prototype to the military authorities for future mass production by them. In view of these factors it cannot be said that the petitioner's possession of the weapon does not bear a reasonable relationship to the efficiency or preservation of the military. And the decision of the Court of Appeals to the contrary is in conflict with the prior decision of this Court in *United States v. Miller.*

B. The Decision Below Is in Conflict With the Conclusion Which Is Reached by Considering This Court's Decisions in Shuttlesworth v. Birmingham and United States v. Freed.

The petitioner was indicted and convicted for a violation of 26 U.S.C. Sec. 5861(d)—the unlawful possession of an unregistered firearm. Throughout these proceedings he has contended that certain regulations pertaining to the manufacture of the type of firearm involved here were unconstitutional on fifth amendment procedural due process grounds; specifically vagueness, unfettered discretion by the licensing officials, and the lack of a hearing and review. The Court of Appeals found that the petitioner lacked standing to raise matters pertaining to the manufacture of firearms since he was charged with possession of a firearm. The petitioner contends that under the peculiar facts presented here, such a ruling is in conflict with decisions of this Court such as *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) and *Freedman v. Mary-*

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land, 380 U.S. 51 (1965), which held that one faced with an unconstitutional licensing and/or registration statute may choose to ignore its provisions and raise its infirmities as a defense in a subsequent prosecution.

The evidence demonstrated that the particular firearm involved was manufactured by the petitioner personally as a prototype. Had the petitioner complied with the statutes and regulations pertaining to the manufacturing of such a firearm, then he would have been in lawful possession of the particular weapon involved herein. This is so because under the peculiar facts of this case, no transfer of the weapon ever occurred between manufacturer and possessor. The petitioner refused and otherwise failed to comply with the administrative procedures which would have legitimatized the manufacture of the weapon because he believed that such rules and regulations were violative of his right to due process of law. If the rules and regulations pertaining to the manufacture of the weapon are unconstitutional, then the petitioner cannot be charged with being in possession of that same weapon since no transfer of it ever took place. See 26 C.F.R. Sec. 179.62. And further, if the regulations pertaining to the manufacture of the firearm are unconstitutional, then the petitioner cannot be charged with unlawful possession of a firearm that he personally manufactured.

The Court of Appeals affirmed the decision of the trial court that the petitioner lacked standing to raise the due process argument in that he was not charged with the illegal manufacturing of the weapon. The Court reasoned that one may not attack the constitutionality of the provisions relating to an offense other than the one for which he was convicted. This statement is true generally, but must admit to an exception under these peculiar facts of this case. Since no transfer ever occurred, the peti-

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tioner is both the transferor and the transferee as those terms are used under the statute. Under the registration provision of the statute, "only possessors who lawfully make, manufacture or import firearms can and must register them; *the transferee does not and cannot register*", *United States v. Freed*, 401 U.S. 601, at 604-05 (1971). Based upon these peculiar facts, here not only is the transferor and the transferee the same person, but the manufacturer as well. Had the petitioner, as the manufacturer, complied with the registration requirements of the Act, then the petitioner as the transferee could not be charged with being in possession of the unregistered firearm. Therefore, the petitioner as the manufacturer should have been granted standing to raise the due process infirmities of the regulations pertaining to the manufacturing of the weapon as part of his defense to the charge of being in possession of the same weapon, without having it registered. In refusing to grant standing to the petitioner to make these arguments, the decision of the Court of Appeals conflicts with the conclusion which is reached by considering the case of *Freed*, and the line of cases as exemplified by *Shuttlesworth* and *Freedman*.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH OTHER CIRCUIT COURTS AS TO A PROPER INTERPRETATION OF THE DECISION IN UNITED STATES v. MILLER.

The several Circuit Courts have been less than unanimous in their interpretation of the *United States v. Miller*, *supra*, decision. Some courts have read *Miller* in much the same manner as the District Court below; that is, they have recognized that a second amendment defense may be presented by an individual to a criminal charge, given a proper evidentiary record. See e.g., *Cody v. United States*, 460 F.2d 34 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1973);

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United States v. Decker, 446 F.2d 165 (5th Cir. 1971). However, in neither of these cases was the court presented with the requisite factual record with regard to the weapon involved and the preservation and efficiency of the military or militia.

Other courts, including the Court of Appeals below, have read *Miller* as being dispositive of the second amendment claim regardless of the factual record before the court. See e.g., *United States v. Day*, 476 F.2d 562 (6th Cir. 1973); *Eckert v. Philadelphia*, 477 F.2d 618 (3rd Cir.), *cert. denied*, 414 U.S. 839 (1973).

Admittedly, the foregoing discussion fails to demonstrate a conflict in the various Circuit Courts relative to the exact holding of the *Miller* decision. It does, however, demonstrate the confusion and inconsistency that exists as to the logical and reasonable inferences which are to be drawn from the *Miller* decision. The presence of these diverse positions should be resolved by a definitive ruling by this Court on the question of the necessary and logical conclusions which are to be drawn from the *Miller* decision relative to the right of the individual to keep and bear arms.

III. THE SUBJECT MATTER OF THIS CASE RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE RIGHT OF THE INDIVIDUAL TO KEEP AND BEAR ARMS.

One of the most controversial topics of modern American society is that of gun control. Its proponents point to the rise of criminal statistics and argue that a general prohibition against firearms must be created to somehow remedy this critical situation. In support of their posi-

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tion, they regard the second amendment as a remnant of our colonial and frontier history having no modern social or political significance. The opponents of gun control maintain that in view of the rising crime rate, the individual's right to keep and bear arms is very meaningful. They regard the second amendment as being viable in today's society in terms of its relationship to the military and to the rights of self defense and privacy which are regarded as inherent to each individual citizen.

Neither of these groups has available to them a definitive interpretation of the second amendment. This Court has only dealt with this issue on three occasions. One decision is that of *United States v. Miller, supra,* which has already been discussed. While the petitioner has urged this decision as supportive of his position, it is recognized that it is less than definitive. The other two decisions are *United States v. Cruikshank,* 92 U.S. 542 (1876) and *Presser v. Illinois, supra,* both of which involved challenges to state statutes which were alleged to contravene the second amendment. This Court upheld the validity of those statutes on the basis that the second amendment constituted a limitation on the national but not the state governments, a distinction which would have no present day vitality.

The area of gun control is of great importance. It is difficult to read a newspaper or periodical which does not mention the efforts of legislatures throughout the country, at all levels, considering some legislation to control the purchase, sale and possession of firearms. Similarly, the efforts of large numbers of groups to block the passage of such enactments is significant. It is indispensible for all concerned to have the benefit of a definite decision by this Court on the question of the present day viability of not only the second amendment but the ninth amend-

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ment as well, as they apply to the rights of an individual to keep and/or bear arms. The Court will recall the testimony of the petitioner where he indicated that it was his belief, based upon his reading of the history surrounding the adoption of the second amendment, that the drafters of that provision contemplated its application to individual rights. At the same time, the petitioner is cognizant that the position he is urging may not be a popular one in this age of violence. Yet we are here dealing with a fundamental right which is mentioned in the Constitution—it does speak of the individual's right to keep and bear arms. And that individual right is in accordance with the colonial experience of this country. Our country was founded with an innate distrust of a standing army as represented by the presence of British troops. The colonists much preferred a local militia which they regarded as the proper instrument in a free society to provide for the defense and the safety of the individual areas. *United States v. Miller, supra,* at 179. See generally, Fuller and Gotting, *The Second Amendment: A Second Look,* 61 NORTHWESTERN L. REV. 46 (1966).

The term "militia" has been defined simply as "(a) body of citizens enrolled for military discipline". *United States v. Miller, supra,* at 179 and more recently as "the body of citizens in a state enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army." *State v. Dawson,* 272 N.C. 535, 159 S.E.2d 1 at 9 (1968). The militia has a purely local character which is completely separate from the military. When called upon to perform some military service, the militiamen were historically expected to appear bearing arms supplied by themselves. Quoting from Osgood's work entitled THE AMERICAN COLONIES IN THE SEVENTEENTH CEN-

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TURY, the Court in *United States v. Miller, supra,* stated at p. 179:

> In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all male adult inhabitants to possess arms . . . .

Thus, the total concept of the militia, at the time the second amendment was adopted, encompassed the keeping of arms by all persons in their homes so as to have those arms readily available for use at such times as these persons might be called upon to serve in the militia. The keeping of arms feature of the second amendment strikes a balance of power of the individual with respect to the federal government by serving as a potent deterrent against the abuses suffered by the colonists under British rule which resulted in the fear of the standing army. This concept was fully recognized by both Hamilton and Madison in THE FEDERALIST PAPERS. Hamilton, in FEDERALIST No. 29, reassured the people that they could always have an "organized" militia comprising a well-trained "select corps of moderate size" as well as an "unorganized militia" comprising "the people at large . . . properly armed and equipped". THE FEDERALIST PAPERS, Mentor Book ed. p. 185 (1961). Thereby, in case of usurpation of power by either a state or the Federal government, the individual citizens would be able to rectify the situation and restore the Constitution. As stated by Hamilton:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same dispositions towards the general government. The people, by throwing themselves into either scale, will infallibly make it pre-

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ponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. THE FEDERALIST PAPERS, *supra* (No. 28) p. 181. (Madison expressed a similar view in No. 46; see also, *United States v. Miller, supra,* at p. 182.)

Notwithstanding this history, the petitioner is cognizant that societal pressures might require that the right of the individual to keep and bear arms no longer be recognized. But any such change should be accomplished by the amendment process and not by legislation. The suggestion that an erosion of one amendment contained in the Bill of Rights threatens the others is something that this Court should consider before upholding the constitutionality of the statute in question which in actuality represents a quick and easy solution to a very vexing problem.

This case presents the opportunity for this Court to issue a definite ruling on the relationship between the second and ninth amendments and the right of the individual to keep and bear arms. Lacking any definite ruling by this Court on the question of the extent to which a statute may regulate the passive possession of firearms, the legislatures presently considering this problem may enact laws which infringe upon this constitutional right, deemed meaningless to some, but sacred to others. Or the legislatures may refrain from enacting laws in this area upon the mistaken belief that such laws are violative of the several constitutional rights which have been discussed. These reasons of great public necessity require that this Court render a decision as to the relationship between the right to keep and bear arms and the individual, if any.

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CONCLUSION

Because the decision of the Court of Appeals conflicts in several respects with prior decisions of this Court, and in view of the public interest and contemporary nature of the subject matter involved herein, and the urgent necessity for a definitive ruling on the issue, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

NORMAN G. ZEMMELMAN
BRITZ & ZEMMELMAN
340 Spitzer Building
Toledo, Ohio 43604

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APPENDIX

JUDGMENT OF THE COURT OF APPEALS

(Filed February 4, 1976)

No. 75-1734

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

FRANCIS J. WARIN,
Defendant-Appellant.

APPEAL From the United States District Court
For the Northern District of Ohio

Before: PHILLIPS, *Chief Judge,* LIVELY and ENGEL, *Circuit Judges.*

JUDGMENT

THIS CAUSE came on to be heard on the record for the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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OPINION OF THE COURT OF APPEALS

(Decided and Filed February 4, 1976)

No. 75-1734

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCIS J. WARIN,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

Before: PHILLIPS, *Chief Judge;* LIVELY and ENGEL, *Circuit Judges.*

LIVELY, *Circuit Judge.* This case requires a determination of whether certain provisions of the National Firearms Act as amended by the Gun Control Act of 1968, 26 U.S.C. §§ 5801 et seq., are an invalid infringement on the right to keep and bear arms guaranteed by the Second Amendment to the Constitution which provides—

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The defendant appeals from his conviction of the charge that he "willfully and knowingly possessed a firearm, that

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is a 9 mm prototype submachine gun measuring approximately 21 inches overall length, with a barrel length of approximately 7½ inches, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code" in violation of 26 U.S.C. §§ 5861(d) and 5871.

At trial before the court, the following facts were stipulated to be true:

> That on or about the 19th day of March, 1974, in the Northern District of Ohio, Western Division, Francis J. Warin willfully and knowingly possessed a firearm, that is, a 9-millimeter prototype submachine gun measuring approximately twenty-one inches overall length, with a barrel length of approximately seven and a half inches, which had not been registered to him in the National Firearms Registration and Transfer Record, . . . that submachine guns are used by the armed forces of the United States, and that submachine guns contribute to the efficient operation of the armed forces of the United States in their function of defending the country . . . . [T]hat the weapon involved in this case is a submachine gun . . . . [T]hat 9-millimeter submachine guns have been used by at least one Special Forces Unit of the Army in the Vietnam, . . . although they are not in general use. 9-millimeter submachine guns have been used by the military forces of the United States on at least one occasion during the Vietnam war . . . . [T]hat submachine guns are part of the military equipment of the United States military— . . . and that firearms of this general type, that is, submachine guns, do bear some relationship, some reasonable relationship, to the preservation or efficiency of the military forces.

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The district court found that the defendant, as an adult male resident and citizen of Ohio, is a member of the "sedentary militia" of the State.[1] It was not contended that Warin was a member of the active militia. The court also found that the defendant was an engineer and designer of firearms whose employer develops weapons for the government and—

> . . . that the defendant had made the weapon in question, which is indeed a firearm as described in the Act. It is also clear from the evidence that the weapon was of a type which is standard for military use, and fires the ammunition which is in common military use for the weapons used by individual soldiers in combat. The defendant testified that he had designed and built the weapon for the purpose of testing and refining it so that it could be offered to the Government as an improvement on the military weapons presently in use. The weapon was not registered to him as required by law.

These findings are not disputed.

In *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court held that the National Firearms Act of 1934

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1. The source of the term "sedentary militia" is unclear. The district court's finding was based in part upon Ohio Constitution, Art. IX § 1, which does not by its own force make adult citizens of Ohio members of the organized or active militia, but merely subjects them to enrollment in that body:

> ARTICLE IX: MILITIA
>
> § 1 Who shall perform military duty.
>
> All citizens, resident of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law. (As amended Nov. 7, 1961.)

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did not violate the Second Amendment. In its opinion the Court stated:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Id.* at 178 (citation omitted).

Warin argues that the necessary implication of the quoted language is that a member of the "sedentary militia" may possess any weapon having military capability and that application of 26 U.S.C. § 5861(d)[2] to such a person violates the Second Amendment. We disagree. In *Miller* the Supreme Court did not reach the question of the extent to which a weapon which is "part of the ordinary military equipment" or whose "use could contribute to the common defense" may be regulated. In holding that the absence of evidence placing the weapon involved in the charges against Miller in one of these categories precluded the trial court from quashing the indictment on Second Amendment grounds, the Court did not hold the converse—that the Second Amendment is an absolute prohibition against all

---

2. Section 5861(d) provides:

It shall be unlawful for any person —

* * * * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

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regulation of the manufacture, transfer and possession of any instrument capable of being used in military action.

Within a few years after *Miller v. United States* was announced the First Circuit dealt wtih arguments similar to those made by Warin in the present case. In *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom. Velazquez v. United States*, 319 U.S. 770 (1943), the court held that the Supreme Court did not intend to formulate a general rule in *Miller*, but merely dealt with the facts of that case. The court of appeals noted the development of new weaponry during the early years of World War II and concluded that it was not the intention of the Supreme Court to hold that the Second Amendment prohibits Congress from regulating any weapons except antiques "such as a flintlock musket or a matchlock harquebus." 131 F.2d at 922. If the logical extension of the defendant's argument for the holding of *Miller* was inconceivable in 1942, it is completely irrational in this time of nuclear weapons.

Agreeing as we do with the conclusion in *Cases v. United States, supra*, that the Supreme Court did not lay down a general rule in *Miller*, we consider the present case on its own facts and in light of applicable authoritative decisions. It is clear that the Second Amendment guarantees a collective rather than an individual right. In *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971), this court held, in a case challenging the constitutionality of 18 U.S.C. App. § 1202(a)(1):

> Since the Second Amendment right "to keep and bear Arms" applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.

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See also, United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

It is also established that the collective right of the militia is limited to keeping and bearing arms, the possession or use of which "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, ..." *United States v. Miller, supra*, 307 U.S. at 178. *See also, United States v. Johnson, supra; Cody v. United States*, 460 F.2d 34, 37 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972).

The fact that the defendant Warin, in common with all adult residents and citizens of Ohio, is subject to enrollment in the militia of the State confers upon him no right to possess the submachine gun in question. By statute the State of Ohio exempts "members of . . . the *organized* militia of this or any other state, . . ." (emphasis added) from the provision, "No person shall knowingly acquire, have, carry, or use any dangerous ordinance." Ohio Revised Code § 2923.17. "Dangerous ordinance" is defined to include any automatic firearm. O.R.C. § 2923.11. There is no such exemption for members of the "sedentary militia." Furthermore, there is absolutely no evidence that a submachine gun in the hands of an individual "sedentary militia" member would have any, much less a "reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller, supra*, at 178. Thus we conclude that the defendant has no private right to keep and bear arms under the Second Amendment which would bar his prosecution and conviction for violating 26 U.S.C. § 5861(d).

Even where the Second Amendment is applicable, it does not constitute an absolute barrier to the congressional regulation of firearms. After considering several argu-

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ments the Third Circuit in *United States v. Tot, supra,* stated that it decided the case on the "broader ground" that "[w]eapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since." 131 F.2d at 266 (footnote omitted). In *Stevens v. United States, supra,* this court discussed the broad power of Congress in relying on the commerce clause of the Constitution to deal with the changing needs of the nation. 400 F.2d at 150-152. In *United States v. Wilson,* 440 F.2d 1068, 1069 (6th Cir. 1971), we held that—

> The congressional history of the National Firearms Act Amendments of 1968 and its predecessor statutes clearly sets out facts sufficient for Congress to have determined that the provisions of 26 U.S.C. § 5801 et seq., as amended in 1968, are within both the taxing power, see *Sonzinsky v. United States,* 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772 (1937), and the commerce power of Congress.

Warin argues that to uphold a tax on firearms transactions by one entitled to Second Amendment protection "would be to *sanction a tax on an activity which is constitutionally guaranteed and protected.*" (emphasis in appellant's brief, p. 17). He cites First Amendment cases such as *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), for the proposition that a person cannot be compelled to pay a license or tax in order to exercise a privilege granted by the Constitution. First Amendment rights occupy a "preferred position" among those guaranteed by the Bill of Rights, *Id.* at 115, a position never accorded to Second Amendment rights. Yet even the First Amendment has never been treated as establishing an absolute prohibition against limitations on the rights guaranteed therein.

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In *Cox v. Louisiana*, 379 U.S. 559, 564 (1965), the Supreme Court stated:

> We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring it within constitutional protection.

In sustaining a city ordinance prohibiting door-to-door solicitation without prior consent of the residents, the Supreme Court wrote in *Breard v. City of Alexandria*, 341 U.S. 622, 642 (1951):

> The First and Fourteenth Amendments have never been treated as absolutes.[33] Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life.

Similarly, in upholding a statute which required a special license to hold a parade, the Court stated that "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

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33. *Cantwell v. Connecticut*, 310 U. S. 296, 303, 304; *Cox v. New Hampshire*, 312 U. S. 569; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Murdock v. Pennsylvania*, 319 U. S. 105, 109-110; *Prince v. Massachusetts*, 321 U. S. 158, 166; *Saia v. New York*, 334 U.S. 558, 561; *Feiner v. New York*, 340 U. S. 315. See the collection of cases in *Niemotko v. Maryland*, 340 U. S. 268, at p. 276 ff.

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As the legislative history of the Act under consideration clearly shows, Congress was dealing with problems which threaten the maintenance of public order. There can be no question that an organized society which fails to regulate the importation, manufacture and transfer of the highly sophisticated lethal weapons in existence today does so at its peril. The requirement that no one may possess a submachine gun which is not registered to him in the National Firearms Registration and Transfer Record is a reasonable regulation for the maintenance of public order.

The defendant appears to concede that some regulation of firearms is permitted. He argues that the taxes imposed upon the making and transfer of such weapons are not appropriate revenue measures, but that their imposition constitutes an indirect attempt to suppress the constitutional right to keep arms. Again, this argument assumes that the Second Amendment granted private rights to individuals, a position which we have rejected. Nevertheless it should be noted that the Act imposes no tax or license on the keeping and bearing of arms, the only rights referred to in the Second Amendment. The taxes are imposed on specific transactions involving firearms. Since the Act does not attempt to tax the right to keep and bear arms, its taxing provisions do not, under any set of circumstances, apply to rights protected by the Second Amendment.

The defendant also argues that "certain regulations pertaining to the manufacture of the type of firearm involved here were unconstitutional on Fifth Amendment due process grounds." The defendant was not charged with violating laws pertaining to the manufacture of firearms, but only with possession of an unregistered submachine gun. The Act deals with a number of distinct of-

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fenses, and one may not attack his conviction of one of the offenses by questioning the constitutionality of provisions relating to another offense. *See United States v. Black*, 431 F.2d 524, 530 (6th Cir. 1970), *cert. denied*, 402 U.S. 975 (1971). The district court properly declined to consider Warin's due process arguments as a maker of firearms.

We also agree with the disposition by the district court of defendant's contention that the statute under which he was charged and convicted violates the Ninth Amendment to the Constitution. We simply do not conceive of the possession of an unregistered submachine gun as one of those "additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (concurring opinion of Goldberg, J.).

It would unduly extend this opinion to attempt to deal with every argument made by defendant and *amicus curiae*, Second Amendment Foundation, all of which are based on the erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States or that defendant's automatic membership in the "sedentary militia" of Ohio brings him within the reach of its guarantees.

The judgment of the district court is affirmed.

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OPINION AND ORDER OF THE DISTRICT COURT

(Filed January 24, 1975)

Criminal No. CR 74-90

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCIS J. WARIN,
Defendant.

OPINION AND ORDER

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

YOUNG, *J*:

The defendant is charged in a one-count indictment with receiving or possessing a firearm, a 9 mm prototype submachine gun, which is not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. §5861(d),[1] Title II of the National Firearms Act as amended (hereinafter Act).

---

1. 26 U.S.C. §5861(d) provides:

It shall be unlawful for any person—

* * * * *

(d) to receive or possess a firearm which is not registered to him in the National Registration and Transfer Record; or

* * * * *

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The case was tried to the Court without the intervention of a jury on October 18, 1974, with argument being made by written briefs. This opinion will serve as the Court's findings of fact and conclusions of law.

The defendant is an engineer and designer of firearms employed by a company which develops military weapons for the United States Government. He is an adult male, and a resident and citizen of the State of Ohio. As such, he is, by the law of that state a member of the State Militia.[2] It is not contended, however, that he is a member of the active militia, but only of the so-called "sedentary militia".[3]

The evidence showed that the defendant had made the weapon in question, which is indeed a firearm as described in the Act. It is also clear from the evidence that the weapon was of a type which is standard for military use, and fires the ammunition which is in common military use for the weapons used by individual soldiers in combat. The defendant testified that he had designed and built the weapon for the purpose of testing and refining it so that it could be offered to the Government as an improvement on the military weapons presently in use. The weapon was not registered to him as required by law.

Thus the case is clearly distinguishable on its facts from *United States v. Miller*, 307 U.S. 174 (1939). That case dealt with a sawed-off shotgun, and Court specifically refers to "[T]he absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less

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2. Ohio Constitution, Article IX, Sec. 1.

3. "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the states . . . ." *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

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than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 179. Here the defendant has offered evidence which establishes his character as a militiaman, and the weapon as a proper military weapon, usable in its exact present form for military purposes. Thus he may properly argue that his situation comes squarely within the scope of the Second Amendment.

However, that does not make an end to the matter, for the Second Amendment is neither the whole of the Constitution, nor superior to all other provisions of that instrument. The defendant in his arguments raises the issue as to the validity of the regulatory scheme of the Act under the broad language of the Second Amendment.

It is important first to consider the overall structure of the Act. It imposes at §5801 an occupational tax on certain firearm importers, manufacturers and dealers, with §5802 requiring the registration of such importers, manufactures and dealers. Section 5811 provides for a tax on the transfer of firearms covered by the Act, and §5812 formulates the requirements for a lawful transfer of a covered firearm. Section 5821 of the Act levies a tax on the making of covered firearms. As part of the scheme to enforce the taxing provisions of the Act, §5861 prohibits certain acts concerning firearms within the Act, including at §5861(d) the receipt or possession of a firearm which is not registered to the receiver or possessor in the National Firearms Registration and Transfer Record.

In the present case, the defendant argues that the exercise of Congress's taxing power with its attendant regulations has relegated his right to keep and bear arms to a mere privilege. Apparently, defendant claims that the

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Second and Ninth Amendment limit the power of Congress to enact the provisions of §5861(d).[4]

It is too late to attack the authority of Congress to pass the Act in the exercise of its taxing power. The Supreme Court in *Sonzinsky v. United States*, 300 U.S. 506 (1937) upheld the provisions of the occupational tax on firearms dealers, now contained in 26 U.S.C. §5801. In *Sonzinsky*, the petitioner contended that the levy was not a true tax, but was imposed for the purpose of suppressing traffic in certain types of firearms, pointing out that the cumulative effect of taxes first on the importer or manufacturer, then on the dealer and finally on the transferor had a prohibitive effect and demonstrated a legislative purpose to regulate rather than to tax. In substance, defendant here makes the same argument.

The Supreme Court answered these arguments, saying:

> On its face it is only a taxing measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities of the taxed, operates as a regulation which is beyond the congressional power.
>
> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so

4. While defendant argues about the effects of the various provisions of the Act on the manufacture of firearms, defendant has standing only to contest the constitutionality of §5361(d) since that is the only part of the Act he is charged with violating.

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because the tax is burdensome or tends to restrict or oppress the thing taxed. . . .[5]

> Inquiring into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. . . . They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. . . . 300 U.S. at 513-14.

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5. The Supreme Court cited the cases of *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869) and *McCray v. United States*, 195 U.S. 27 (1904). In *Veazie Bank*, the Supreme Court replied to the argument that a ten percent tax on the notes issued by a state bank was excessive to a point of destroying the state franchise of the bank.

> The first answer to this is that the judicial cannot prescribe to the legislative departments of government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot for that reason only, be pronounced contrary to the Constitution. 75 U.S. (8 Wall.) at 548.

In *McCray*, Congress imposed a tax of ten cents a pound on oleomargarine colored yellow while at the same time oleomargarine free from artificial coloration causing it to look like butter was taxed at one-fourth of one cent a pound. Responding to the argument that enforcing the tax would destroy or restrict the manufacture of artificially colored oleomargarine, Mr. Justice White stated for the Supreme Court:

> Since . . . the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument [which are that Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity] it must follow if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. 195 U.S. at 59.

See also United States v. Kahriger, 345 U.S. 22 (1953) (tax on persons engaged in the business of accepting wagers); *United States v. Sanchez*, 340 U.S. 42 (1950) (tax on marihuana); *Nigro v. United States*, 276 U.S. 332 and *United States v. Doremus*, 249 U.S. 86 (1919) (tax on narcotics).

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The Supreme Court in *Sonzinsky* squarely held that a tax of $200 per year upon dealers of firearms was within the national taxing power. 300 U.S. at 514. Subsequent lower federal courts have treated the issue of the power of Congress to enact the taxing measures of the Act with its attendant regulations as a closed matter. *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir.) *cert. denied*, 409 U.S. 868 (1972); *United States v. Giannini*, 455 F.2d 147, 148 (9th Cir. 1972); *United States v. Wilson*, 440 F.2d 1068, 1069 (6th Cir. 1971); *United States v. Smith*, 341 F. Supp. 687, 688-89 (N.D. Ga. 1972).

Based upon the foregoing authorities, the Court concludes that 26 U.S.C. §5861(d) is part of the regulatory scheme which aids the enforcement of the transfer tax provisions of §5811 of the Act. Section 5861(d) is a penalty imposed by Congress upon the receipt or possession of unregistered firearms which was enacted as a necessary and proper provision required in execution of its taxing power. The effect of the regulatory scheme upon citizens who possess or receive firearms not registered in the National Firearms Registration and Transfer Record is merely incidental to the exercise of the federal power of taxation. Even assuming that under the peculiar facts of the present case the defendant, as a militiaman has the right under the Second Amendment to keep and bear, without infringement, the weapon introduced in evidence, that right, like other rights in the Bill of Rights, is subject to reasonable limitations and is not absolute,[6] as the defendant recognizes

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6. Even under the First Amendment, some expressions are subject to limitations, such as speech which incites lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and obscenity, *Miller v. California*, 413 U.S. 15 (1973). Also, the Court of Appeals for the Sixth Circuit has held that the Second Amendment is subject to limitations, such as the provision in 18 U.S.C. §1202(a)(1) which makes it a criminal offense for a person convicted of a felony to receive, possess, or transport in commerce any firearm. *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971).

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at page 7 of his brief. The imposition of a tax and attendant regulations to insure the enforcement of the tax on the import or manufacture and the transfer of certain firearms which is within the power of Congress cannot be challenged in the courts, but only in the Congress. Congress, and not the courts, must weigh and resolve any conflicts between the taxing power and the Second Amendment.

For the reasons set forth herein and for good cause appearing, the Court is constrained to make a finding of guilty, and it is therefore

ORDERED that the defendant is guilty as charged in the indictment, and it is

FURTHER ORDERED that this matter is continued for sentence pending the preparation of a pre-sentence report. Counsel for the defendant shall instruct him to make an appointment with Ralph H. French, United States Probation Officer, Toledo, Ohio, and it is

FURTHER ORDERED that defendant's appearance bond will be continued.

/s/ WILLIAM J. YOUNG
United States District Judge

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CONSTITUTION, STATUTES AND REGULATIONS

The second amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

The ninth amendment to the United States Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Title 26, U.S.C. Section 5861(d) and (f) provides:

> It shall be unlawful for any person
>
> * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearm Registration and Transfer Record; . . .
>
> * * *
>
> (f) to make a firearm in violation of the provisions of this chapter . . . .

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Title 26, C.F.R. Parts 179.62-65 provides:

APPLICATION TO MAKE A FIREARM

§ 179.62 Application to make.

No person shall make a firearm unless he has filed with the Director a written application on Form 1 (Firearms), Application to Make and Register a Firearm in duplicate, executed under the penalties of perjury, to make and register the firearms and has received the approval of the Director to make the firearm which approval shall effectuate registration of the weapon to the applicant. The application shall identify the firearm to be made by serial number, type, model, caliber or gauge, length of barrel, other marks of identification, and the name and address of original manufacturer (if he is not the original manufacturer). The applicant must identify himself on the Form 1 (Firearms) by name and address and, if other than a natural person, the name and address of the principal officer or authorized representative and the employer identification number and, if an individual, the identification must include the date and place of birth and the social security number of the applicant and the information prescribed in § 179.63. Each applicant shall identify the Federal firearms license and special (occupational) tax stamp issued to him, if any. *The applicant also shall show required information evidencing that his making or possession of the firearms would not be in violation of law.* Further, the applicant shall show why he intends to make the firearm. A National Firearms Act stamp (see § 179.61) must be affixed to the original application in the space provided therefor and properly canceled (see § 179.67) if the making is taxable. If the making of the firearm is tax exempt under this part, an explanation of the basis of the exemption shall be attached to the Form 1 (Firearms). Form 1 (Firearms) and ap-

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propriate tax stamp may be obtained from any District Director of Internal Revenue. (emphasis added)

§ 179.63 Identification of applicant.

If the applicant is an individual, he shall attach to each copy of the Form 1 (Firearms) a properly executed Form 4539, Identification of Transferee or Maker of Firearm, containing an individual photograph of himself, taken within 1 year prior to the date of such application, and his fingerprints. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. *The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that he has no information indicating that the possession of the firearm by the maker would be in violation of State or local law or that the maker will use the firearm for other than lawful purposes.* (emphasis added)

§ 179.64 Procedure for approval of application.

The application to make a firearm, Form 1 (Firearms), must be forwarded directly, in duplicate, by the maker of the firearm to the Director. The Director will consider the application for approval or disapproval. If the application is approved, the Director will return the original thereof to the maker of the firearm and retain the duplicate. Upon receipt of the approved application, the maker is authorized to make the firearm described therein. The maker of the firearm shall not, under any circumstances, make the firearm until the application, satisfactorily executed, with the

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"National Firearms Act" stamp attached, has been forwarded to the Director and has been approved and returned by him. If the application is disapproved, the original Form 1 (Firearms) with the "National Firearms Act" stamp attached thereto will be returned to the applicant with the reasons for disapproval stated on the form, and tax will be refunded as provided in § 179.172.

§ 179.65 Denial of application.

An application to make a firearm shall not be approved by the Director if the making or possession of the firearm would place the person making the firearm in violation of law.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1399

FRANCIS J. WARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 530 F.2d 103. The opinion of the district court (Pet. App. A12-A18) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on February 4, 1976. On February 23, 1976, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 5, 1976. The petition was filed on April 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

26 U.S.C. 5861(d) provides:

> It shall be unlawful for any person—
>
> * * * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms registration and Transfer Record * * *.

QUESTIONS PRESENTED

1. Whether petitioner's prosecution for possession of an unregistered machine gun violated the Second Amendment.

2. Whether petitioner, who was charged only with possession of an unregistered machine gun and has not sought to become licensed as a manufacturer, can contest the validity of provisions regulating the manufacture of machine guns.

STATEMENT

After a jury-waived trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of possessing an unregistered firearm (a machine gun), in violation of 26 U.S.C. 5861(d). He was sentenced to three years' probation. The court of appeals affirmed.

The trial was based largely upon stipulated facts (Pet. App. A3). Petitioner wilfully and knowingly possessed a submachine gun 21 inches long with a barrel length of seven and one-half inches. This firearm had not been registered to him in the National Firearms Registration and Transfer Record. Petitioner made the

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weapon. The parties agreed that submachine guns are used by the armed forces of the country and that "firearms of this general type, that is, submachine guns, do bear some relationship, some reasonable relationship, to the preservation or efficiency of the military forces" (Pet. App. A3).

ARGUMENT

1. Petitioner's basic contention is that Section 5861(d), as applied to his possession of a submachine gun, violates a personal right to bear arms vested in him by the Second Amendment. It is settled, however, that the Second Amendment does not establish an unqualified personal right to bear all kinds of arms. *United States* v. *Miller*, 307 U.S. 174 (prosecution under the National Firearms Act of 1934, 48 Stat. 1236, for possession of a sawed-off shotgun); *Cases* v. *United States*, 131 F.2d 916 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770.

In *Miller* the Court held that, absent any indication that possession of a sawed-off shotgun would contribute to the efficacy of the state militia, "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument" (307 U.S. at 178).[1]

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[1]Petitioner makes the bald assertion that citizens of Ohio who might be called into militia service would be expected to furnish their own weaponry (Pet. 10). Given the complexity of current military hardware and the sophistication of contemporary warfare, it is inconceivable that a state militia would be sent to battle armed only with "home grown guns." No provision of Ohio law requires its citizens to maintain arms. Indeed, Ohio Revised Code §§2923.17 and 2923.11 (1953) provide that only members of the active militia (which does not include petitioner) are exempt from other provisions of state law forbidding the possession of machine guns.

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The Second Amendment, as the court below noted, establishes "a collective rather than an individual right" (Pet. App. A6). It guarantees the "right of the State to maintain a militia and not * * * the individual's right to bear arms." *Stevens* v. *United States*, 440 F.2d 144, 149 (C.A. 6). See also *United States* v. *Johnson*, 497 F.2d 548 (C.A. 4); *United States* v. *Tot*, 131 F.2d 261 (C.A. 3), reversed on other grounds, 319 U.S. 463. No court of appeals has struck down any federal firearms statute on Second Amendment grounds; that being so, there is no need for review by this Court.[2]

2. Petitioner also contends (Pet. 13-15) that the lower courts improperly declined to address his arguments that certain statutes and regulations pertaining to the manufacture of machine guns (see 26 U.S.C. 5822; 27 C.F.R. 179.62) violated the Due Process Clause of the Fifth Amendment. The court below concluded, properly we submit, that petitioner could not raise these issues because he was not charged with the illegal manufacture of the firearm involved, but rather with possession of an unregistered weapon (Pet. App. A10-A11).

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[2]There is no conflict among the circuits as to the interpretation of the Court's holding in *Miller*. *Cody* v. *United States*, 460 F.2d 34 (C.A. 8), certiorari denied, 409 U.S. 1010, and *United States* v. *Decker*, 446 F.2d 164 (C.A. 8), involved the making of false statements pursuant to a firearm purchase and the failure of a gun dealer to maintain required records. These decisions held only that such requirements did not affect the maintenance of an effective militia; they do not conflict with the opinion below that petitioner's possession of a single machine gun is not protected by the Second Amendment.

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But even assuming that one charged only with a possessory offense may contest the constitutionality of manufacturing statutes and regulations, this would be so only if the party seeking to challenge the provisions in question had first sought to secure a license to manufacture. Petitioner did not do so. *Bourjois, Inc.* v. *Chapman*, 301 U.S. 183, 188; *Independent Warehouses, Inc.* v. *Scheele*, 331 U.S. 70, 88. Cf. *Aircraft and Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752. The cases cited by petitioner (*Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 151; *Freedman* v. *Maryland*, 380 U.S. 51, 56) for the opposite proposition represent an exception (based upon the special nature of First Amendment interests) to the general rule requiring exhaustion of administrative remedies. No similar exception has been recognized by any court for Second Amendment claims.[3]

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[3]Since the Second Amendment does not preclude taxation or regulation of firearm possession (*Sonzinsky* v. *United States*, 300 U.S. 506), the Second Amendment does not create a right to be free of a "chilling effect" that has been thought to justify special treatment of First Amendment cases. Cf. *United States* v. *Powell*, 423 U.S. 87, 92, in which the Court declined to apply the special First Amendment void-for-vagueness doctrine to a statute forbidding the mailing of certain weapons.

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CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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